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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 342

NATIONAL UNION OF MARINE COOKS AND STEWARDS ASSOCIATION,

Appellant,

vs.

GEORGE ARNOLD, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM AND FOR DAMAGES AND DOUBLE COSTS.

SAMUEL D. BASSETT,
Counsel for Appellees.

JOHN GEISNESS,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 342

NATIONAL UNION OF MARINE COOKS AND STEWARDS ASSOCIATION, A VOLUNTARY ASSOCIATION, *Appellant*,

vs.

GEORGE ARNOLD, ET AL., *Appellees*

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM AND FOR DAMAGES AND DOUBLE COSTS.

Motion to Dismiss or Affirm and for Damages and Double Costs

The appellees respectfully move the court that the appeal herein be dismissed or the judgment appealed from affirmed, with damages and double costs, because no substantial federal question is involved, no federal question was presented or passed upon in the state court, and the appeal is frivolous and vexatious.

Statement Supporting Motion and Opposing Jurisdiction

1. No Substantial Federal Question

This Court will not retain jurisdiction if no substantial federal question is presented. *Seaboard Air Line Ry. Co.* v.

Watson, 287 U. S. 86, 77 L. Ed. 180. Here, the suggestion of a federal question is frivolous.

Appellant voluntary association is a judgment debtor. After judgment, proceedings supplemental to execution were initiated. These proceedings are not independent proceedings, but are merely auxiliary to the original action, and a continuation thereof. (Washington Supreme Court opinion herein, 142 Wn. Dec. 590, 257 P. (2d) 629, and cases therein cited.) Jurisdiction to obtain the money judgment was conceded. The various steps in the supplemental proceedings were taken by orders to show cause, and culminated in an adjudication that the appellant was guilty of contempt for failure to comply with an order directing transfer of certain bonds situated in California to a receiver in Washington. After appellant's motion to quash, the trial court found:

> "Each of the Orders to Show Cause issued in the supplemental proceedings herein was duly and regularly served upon the defendant association by timely delivery of a certified copy thereof to an agent of said association in King County, Washington, with general authority to act for said association in the State of Washington, to-wit: upon the Seattle Agent or the Acting Seattle Agent of said association. Said Order to Show Cause why a receiver should not be appointed was also duly and regularly served upon said defendant association by timely delivery of a copy thereof to a Secretary of counsel of record for said defendant association in the above entitled cause in the office of said counsel on a regular business day during regular business hours. At all times herein mentioned said defendant association has been regularly engaged in business in Seattle, King County, Washington, and is still regularly engaged in business therein. At all times herein mentioned defendant union has collected and still collects dues, fines and assessments in Seattle, King County, Washington, at the rate of approximately

> $25,000.00 each six months and at all times herein mentioned said defendant remitted and still remits said receipts weekly to the National office of said defendant in San Francisco, California" (Transcript in State Supreme Court 21-22).

This finding has not been attacked. Furthermore, as the trial court recited, counsel for appellant admitted "that service of said orders to show cause was made upon the defendant association in the same manner as service of summons and complaint in the main action upon said defendant and that said service of said summons and complaint was adequate to give the court jurisdiction of said main cause and of the defendant association as a defendant therein." In addition to the foregoing, as recited in the opinion below, a certified copy of the order directing transfer of the bonds to the receiver was delivered to the president of appellant in Honolulu, and thereafter, a certified copy of the order requiring the appellant to show cause why it should not be adjudged in contempt was delivered to appellant's general agent in Washington and to its president in San Francisco.

Appellant now contends that the supplemental proceedings lacked due process for failure to serve, within the State of Washington, notice upon officers or members of the association having custody or control of the assets, and without attachment of the assets. This contention is frivolous. It is obvious that appellant was accorded due process under the tests stated in *International Shoe Co.* v. *Washington*, 90 L. Ed. 95, 326 U. S. 310.

2. Federal Question Not Presented or Decided

Even if a federal constitutional question exists in the case, it will not be considered by the United States Supreme Court because it was not presented or decided in the state court. *Wilson* v. *Cook*, 327 U. S. 474, 90 L. Ed. 793.

No federal question was decided by the state court in the instant case, nor was any question presented to the state court. To present a federal question to a state court so as to preserve it for appeal to the United States Supreme Court, the federal claim must be asserted at the proper time and in the proper manner by appropriate action under the state system of pleading and practice. *Hartford Life Insurance Co.* v. *Johnson*, 249 U. S. 490, 63 L. Ed. 722.

The appropriate state rule of practice, applicable to constitutional claims as well as to other contentions, is that the Supreme Court of the State of Washington will not consider questions not raised before the trial court. *Unemployment Compensation Department* v. *Hunt*, 17 Wn. (2d) 228, 135 P. (2d) 89. No constitutional question was raised in the trial court. Appellant suggests that it could not raise the constitutional question in the trial court because of a special appearance and motion to quash made by appellant. However, this did not preclude its constitutional argument.

Appellant's constitutional contention is that the supplemental proceedings against it were instituted and conducted without notice sufficient to afford due process. This would have been an apropriate argument in support of its motion to quash, particularly as the Supreme Court of the State of Washington has expressly recognized that a court that proceeds without sufficient notice to constitute due process proceeds without jurisdiction. *State, ex rel. Adams* v. *Superior Court*, 36 Wn. (2d) 868, 220 P. (2d) 1081. In addition, under Washington practice, the appellant was not required to stand upon its motion to quash in order to take advantage of its special appearance. Appellant could have preserved its special appearance and still litigate in the trial court every conceivable defense, without waiving its motion to quash. *Alto* v. *Hartwood Lumber Co.*, 135 Wash. 368, 237 Pac. 987.

Nor was the constitutional question adequately raised in the state appellate court. Under the state rules of practice, in a brief of appellant, "Each error relied on shall be clearly pointed out and discussed under appropriate headings," (Rules on Appeal, 34 A, Wn. (2d) P. 45, Rule 42). We do not find that a federal question was raised, as asserted by appellant, by way of an assignment of error in appellant's brief in the state appellate court. The Constitution is not mentioned. The only claimed error "clearly pointed out and discussed under appropriate headings" is that the trial court proceeded without warrant of state law. The only quotation from the state court proceedings set forth by appellant as a claim of federal right is a rhetorical statement at the end of its state court brief under the caption "Conclusion", and here appellant does not indicate that it invokes the Constitution of the United States and relies upon it.

Finally, independent of state rules, the question whether a federal constitutional claim was distinctly and sufficiently brought to the notice of the state court is itself a federal question (*Carter* v. *Texas*, 44 L. Ed. 839, 177 U. S. 442) and the requirement is not met by a party unless he "unmistakably declares that he invokes, for the protection of his rights, the Constitution * * * of the United States." *Michigan Sugar Co.* v. *Michigan*, 185 U. S. 112, 46 L. Ed. 829. Appellant made no such declaration.

3. Damages and Double Costs

Under 28 U. S. C. A., Section 1912 (62 Stat. 954, c. 646) "When a judgment is affirmed by the Supreme Court or a Court of Appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs." Under this section, the United States Supreme Court has power to impose just damages

upon the affirmance of any judgment or decree, for delay, and a penalty may be imposed upon dismissal just as upon an affirmance. *Wagner Electric Manufacturing Co.* v. *Lynden*, 262 U. S. 226, 67 L. Ed. 961 (construing R. S. 1010, 28 U. S C. 1940, Section 878, from which the present Section 1912, Title 28, U. S. C. was derived without material change). Since the federal question relied upon is unsubstantial and frivolous, it conclusively follows that the appeal was prosecuted for delay. *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 57, L. Ed. 140.

We submit that the appeal is so wholly without merit as to call for the imposition of damages and double costs pursuant to the statute.

Respectfully submitted,

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Attorney for Appellee.

JOHN GEISNESS,
Of Counsel.